

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

**IN RE: VALSARTAN, LOSARTAN,
AND IRBESARTAN PRODUCTS
LIABILITY LITIGATION**

This Document Relates to All Actions

MDL No. 2875

Honorable Robert B. Kugler,
District Court Judge

**NOTICE OF DEFENDANTS' MOTION FOR LEAVE TO FILE
INSTANTER SURREPLY BRIEFS IN FURTHER OPPOSITION TO
PLAINTIFFS' MOTIONS FOR CLASS CERTIFICATION, AND REQUEST
FOR A CLASS CERTIFICATION HEARING**

PLEASE TAKE NOTICE that on June 21, 2022, or as soon as counsel may be heard, the undersigned counsel, on behalf of all Defendants, shall move for the entry of an Order granting Defendants' Motion for Leave to File *Instanter* Surreply Briefs in Further Opposition to Plaintiffs' Motions for Class Certification, and Request for a Class Certification Hearing.

PLEASE TAKE FURTHER NOTICE that in support of their motion, the Defendants shall rely upon the Brief in Support submitted herewith and exhibits thereto and any reply submissions made hereafter; and

PLEASE TAKE FURTHER NOTICE that a proposed Order is submitted herewith; and

PLEASE TAKE FURTHER NOTICE that oral argument is requested.

Dated: May 20, 2022

Respectfully Submitted:

By: /s/ Jessica D. Miller

Jessica D. Miller
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Jessica D. Miller, *Liaison Counsel for
Manufacturer Defendants*
Nina R. Rose
1440 New York Ave., N.W.
Washington, D.C. 20005
Tel.: (202) 371-7000
Fax: (202) 661-0525
jessica.miller@skadden.com
nina.rose@skadden.com

*Attorneys for Zhejiang Huahai
Pharmaceutical Co, Ltd., Huahai U.S.,
Inc., Princeton Pharmaceutical Inc., and
Solco
Healthcare US, LLC*

GREENBERG TRAURIG, LLP
Gregory E. Ostfeld
Tiffany M. Andras
77 West Wacker Dr., Ste. 3100
Chicago, Illinois 60601
Tel.: (312) 456-8400
Fax: (312) 456-8435
OstfeldG@gtlaw.com
AndrasT@gtlaw.com

GREENBERG TRAURIG, LLP
Lori G. Cohen
Victoria Davis Lockard
Steven M. Harkins
Terminus 200
3333 Piedmont Road, N.E., Ste. 2500
Atlanta, Georgia 30305
Tel.: (678) 553-2100

Fax: (678) 553-2386
CohenL@gtlaw.com
LockardV@gtlaw.com
HarkinsS@gtlaw.com

GREENBERG TRAURIG, LLP
Brian H. Rubenstein
1717 Arch Street, Suite 400
Philadelphia, Pennsylvania
Tel: (215) 988-7864
Fax: (214) 689-4419
rubensteinb@gtlaw.com

*Attorneys for Teva Pharmaceuticals
USA, Inc., Teva Pharmaceutical
Industries Ltd., Actavis Pharma, Inc.,
and Actavis LLC*

PIETRAGALLO GORDON ALFANO
BOSICK & RASPANTI, LLP
Clem C. Trischler
Jason M. Reefer
Frank H. Stoy
38th Floor, One Oxford Centre Pittsburgh,
Pennsylvania 15219
Tel.: (412) 263-2000
Fax: (412) 263-2001
cct@pietragallos.com
jmr@pietragallos.com
fhs@pietragallos.com

*Attorneys for Mylan Laboratories, Ltd.
and Mylan Pharmaceuticals, Inc.*

KIRKLAND & ELLIS LLP
Devora W. Allon
Alexia R. Brancato
601 Lexington Avenue
New York, New York 10022
Tel.: (212) 446-5967

Fax: (212) 446-6460
devora.allon@kirkland.com
alexia.brancato@kirkland.com

*Attorneys for Torrent Pharmaceuticals
Ltd.
and Torrent Pharma Inc.*

MORGAN, LEWIS & BOCKIUS LLP
John P. Lavelle, Jr.
1701 Market Street
Philadelphia, Pennsylvania 19103
Tel.: (215) 963-5000
Fax: (215) 963-5001
John.lavelle@morganlewis.com

John K. Gisleson
One Oxford Centre, Thirty-second Floor
Pittsburgh, Pennsylvania 15219
Tel.: (412) 560-3300
Fax: (412) 560-7001
John.gisleson@morganlewis.com

*Attorneys for Aurobindo Pharma Ltd.,
Aurobindo Pharma USA, Inc., and
Aurolife Pharma LLC*

LEWIS BRISBOIS BISGAARD & SMITH
LLP
Walter H. Swayze, III
Andrew F. Albero
550 E. Swedesford Road, Suite 270
Wayne, Pennsylvania 19087
Tel.: (215) 977-4100
Fax: (215) 977-4101
Pete.Swayze@lewisbrisbois.com
Andrew.Albero@lewisbrisbois.com

*Attorneys for Camber Pharmaceuticals,
Inc. and The Kroger Co.*

HILL WALLACK LLP
Eric I. Abraham
William P. Murtha
21 Roszel Road
P.O. Box 5226
Princeton, New Jersey 08543-5226
Tel.: (609) 734-6358
Fax: (609) 452-1888
eabraham@hillwallack.com
wmurtha@hillwallack.com

*Attorneys for Hetero Drugs, Ltd. and
Hetero Labs Ltd.*

HARDIN KUNDLA MCKEON &
POLETTO
Janet L. Poletto, Esq.
Robert E. Blanton, Jr., Esq.
673 Morris Ave.
Springfield, New Jersey 07081
Tel.: (973) 912-5222
Fax: (973) 912-9212
jpoletto@hkmpp.com
rblanton@hkmpp.com

Attorneys for Hetero USA Inc.

BARNES & THORNBURG LLP
Sarah E. Johnston, *Liaison Counsel for
Retail Pharmacy Defendants*
Kristen L. Richer
2029 Century Park East
Suite 300
Los Angeles, California 90067
Tel.: (310) 284-3880
Fax: (310) 284-3894
sarah.johnston@btlaw.com
kristen.richer@btlaw.com

Kara Kapke
11 S Meridian St.
Indianapolis, Indiana 46204
Tel. (317) 236-1313
Fax (317) 231-7433
kara.kapke@btlaw.com

*Attorneys for CVS Pharmacy, Inc.
(incorrectly named as CVS Health
Corporation), Rite Aid Corporation,
Walgreen Co. (incorrectly named as
Walgreens Co.), and Walmart Inc.
(incorrectly named as Walmart Stores,
Inc.)*

HUSCH BLACKWELL LLP
Matt Knepper
James Spung
190 Carondelet Plaza
Suite 600
St. Louis, Missouri 63105
Tel.: (314) 480-1500
Fax: (314) 480-1505
Matt.knepper@huschblackwell.com
James.spung@huschblackwell.com

Attorneys for Express Scripts, Inc.

DORSEY & WHITNEY LLP
Shevon D.B. Rockett
Roxanna Gonzalez
51 West 52nd Street
New York, New York 10019
Tel.: (212) 415-9357
Fax: (212) 953-7201
rockett.shevon@dorsey.com
gonzalez.roxanna@dorsey.com

Attorneys for Optum, Inc. and Optum Rx

BUCHANAN INGERSOLL & ROONEY
PC

Jonathan D. Janow
Jason R. Parish
1700 K Street NW
Suite 300
Washington, DC 20006
Tel.: (202) 452-7940
Fax: (202) 452-7989
Jonathan.Janow@bipc.com
Jason.Parish@bipc.com

Attorneys for Albertson's LLC

CROWELL & MORING

Andrew D. Kaplan
Daniel T. Campbell
Marie S. Dennis
1001 Pennsylvania Avenue NW
Washington, D.C. 20004
Tel.: (202) 624-1000
Fax: (202) 628-5116
akaplan@crowell.com
dcampbell@crowell.com
mdennis@crowell.com

Attorneys for Cardinal Health, Inc.

ULMER & BERNE LLP

Jeffrey D. Geoppinger
312 Walnut Street, Suite 1400
Cincinnati, Ohio 45202-2409
Tel.: (513) 698-5038
Fax: (513) 698-5039
jgeoppinger@ulmer.com

*Attorney for AmerisourceBergen
Corporation*

NORTON ROSE FULBRIGHT US LLP

D'Lesli M. Davis
Ellie K. Norris
2200 Ross Avenue, Suite 3600
Dallas, Texas 75201-7932
Tel.: (214) 855-8221
Fax: (214) 855-8200
Dlesli.davis@nortonrosefulbright.com
Ellie.norris@nortonrosefulbright.com

Attorneys for McKesson Corporation

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MDL No. 2875

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**BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR LEAVE TO FILE
INSTANTER SURREPLY BRIEFS IN FURTHER OPPOSITION
TO PLAINTIFFS' MOTIONS FOR CLASS CERTIFICATION, AND
REQUEST FOR A CLASS CERTIFICATION HEARING**

Pursuant to Local Civil Rules 7.1(d)(6) and 78.1(b), Defendants: (1) seek leave of the Court to file short, targeted surreply briefs to address new arguments, new authorities, and new expert and factual matters raised in Plaintiffs' reply briefs in support of their motions for class certification; and (2) request that the Court set Plaintiffs' Motions for Class Certification for a hearing. Plaintiffs have indicated that they oppose this motion.

A. Defendants Should Be Granted Leave To File Surreplies.

Local Civil Rule 7.1(d)(6) requires leave of the Court to file a surreply. In the class certification context, surreplies are routinely allowed where, as in this case, Plaintiffs have submitted significant new exhibits, new legal argument, and new authorities in their reply briefs, and have thereby introduced new issues into the class

certification controversy. *See, e.g., Laurens v. Volvo Cars USA, LLC*, No. 2:18-cv-08798-JMV-CLW, 2020 WL 10223641, at *6 & n.9 (D.N.J. Dec. 8, 2020) (granting leave to file a surreply where the plaintiffs presented an argument in their reply brief in support of class certification that “was not clearly articulated in the motion for class certification and was effectively newly raised in the reply brief”); *Morgan v. Rohr, Inc.*, No. 3:20-cv-00574-GPC-AHG, 2021 WL 4806472, at *2-3 (S.D. Cal. Oct. 14, 2021) (granting leave to file a surreply where plaintiffs submitted new “lengthy collections of evidence” and a new trial plan “as part of the reply”); *Eldridge v. Cardif Life Ins. Co.*, 266 F.R.D. 173, 175 (N.D. Ohio 2010) (granting leave to file a surreply where plaintiff’s class certification reply brief “raise[d] new arguments” relating to a newly filed “affidavit and . . . exhibits”).

The Court should allow Defendants to file narrowly-targeted surreplies pursuant to this precedent in order to address the most important new arguments, authorities, and evidence submitted by Plaintiffs for the first time in their replies, for the following reasons:

- Plaintiffs’ Reply in Further Support of Their Motion for Class Certification of Consumer Economic Loss Claims (the “Consumer Economic Loss Reply”) abandons Plaintiffs’ original Trial Plan, which proposed that “a single trial” decide “all of the Classes’ claims” in one three-phase proceeding; includes new appendices, trial plans and jury

instructions; relies heavily on new authorities and arguments never raised in Plaintiffs' opening brief; proposes a new, unprecedented (and still unworkable) three-part standard to determine the viability of Plaintiffs' proposed state law "groupings"; and misstates various state laws in attempting to argue that Defendants' state-law variation appendices are erroneous.

- With respect to the Wholesaler Defendants, the Consumer Economic Loss Reply also misstates the facts with regard to the information available to trace putative class members' VCDs to Wholesalers, relies on unsupported arguments raised for the first time on reply, and relies on newly asserted misrepresentations, misstatements, and mischaracterizations as to Dr. Conti's unjust enrichment damages calculation—most of which go far beyond what Dr. Conti herself testified to—and misrepresents the applicable caselaw regarding unjust enrichment.
- The Third-Party Payors' Reply Brief in Support of Motion for Class Certification asserts the new and novel position that this Court may certify classes based solely on rulings made at the motion to dismiss stage and urges the Court to use Rule 23 in a manner that would abridge, enlarge, or modify substantive state law rights in contravention of the

Rules Enabling Act.

- The Reply Memorandum of Law in Support of the Medical Monitoring Plaintiffs’ Motion for Class Certification proposes new state law groupings based on whether the states require “present physical injury,” “subcellular injury,” or “no injury at all”; abandons Plaintiffs’ prior medical monitoring plan as proposed by their expert, Dr. Kaplan, and instead—like the Consumer Economic Loss Reply—punts to this Court to craft an entirely different remedy after a class is certified; cites several heavily-criticized, decades-old authorities in support of certifying medical monitoring classes; seeks for the first time to bolster Plaintiffs’ defective “Lifetime Cumulative Thresholds” by citing to additional general causation experts who were not referenced in Plaintiffs’ opening brief; and presents 15 new exhibits in support of the foregoing new arguments.

Defendants submit *instanter*, as Exhibits 1 through 4 hereto, their proposed surreplies, each of which is short, focused, and addresses specific new evidence, arguments, and authority.

B. The Court Should Set A Hearing On Plaintiffs’ Motions For Class Certification.

Defendants also respectfully request that the Court set Plaintiffs’ Motion for Class Certification for a hearing to afford Defendants an opportunity to further

present their positions on Plaintiffs' factual submissions and legal arguments, including the new facts and arguments offered by Plaintiffs for the first time on reply. Plaintiffs are seeking certification of more than 120 subclasses collectively asserting damages alleged to be in the billions of dollars, as well as equitable relief through a decades-long monitoring program. The Court has received hundreds of pages of briefing and thousands of pages of appendices and exhibits in support of the parties' respective positions. Under these circumstances, setting a hearing on class certification will enable the parties to present their respective positions to the Court in a single proceeding, will afford the Court an opportunity to have the parties address specific controversies and questions, and will create a more complete record on which the Court may make its class certification determinations. *See Byrd v. Aaron's Inc.*, 784 F.3d 154, 169-70 (3d Cir. 2015) (finding that district court abused its discretion by summarily adopting magistrate judge's report and recommendation on class certification, in part because "no oral argument was held on the class-certification motion" leaving the Third Circuit to "wonder why the [d]istrict [c]ourt determined" an explanation offered in opposition to the report and recommendation "was inadequate").

Specifically, Defendants propose a one-day oral argument, with each side allocated three hours to present its positions on Plaintiffs' Motions for Class Certification.

WHEREFORE, for the foregoing reasons, Defendants respectfully request that this Court enter the accompanying Proposed Order: (1) granting Defendants leave to file the accompanying Surreplies *instanter*; (2) setting Plaintiffs' Motions for Class Certification for a one-day oral argument; and (3) granting such other and further relief as the Court deems necessary or proper.

Dated: May 20, 2022

Respectfully Submitted:

By: /s/ Jessica D. Miller
Jessica D. Miller

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Jessica D. Miller, *Liaison Counsel for
Manufacturer Defendants*
Nina R. Rose
1440 New York Ave., N.W.
Washington, D.C. 20005
Tel.: (202) 371-7000
Fax: (202) 661-0525
jessica.miller@skadden.com
nina.rose@skadden.com

*Attorneys for Zhejiang Huahai
Pharmaceutical Co, Ltd., Huahai U.S.,
Inc., Princeton Pharmaceutical Inc., and
Solco Healthcare US, LLC*

GREENBERG TRAURIG, LLP
Gregory E. Ostfeld
Tiffany M. Andras
77 West Wacker Dr., Ste. 3100
Chicago, Illinois 60601
Tel.: (312) 456-8400
Fax: (312) 456-8435
OstfeldG@gtlaw.com

AndrasT@gtlaw.com

GREENBERG TRAURIG, LLP

Lori G. Cohen

Victoria Davis Lockard

Steven M. Harkins

Terminus 200

3333 Piedmont Road, N.E., Ste. 2500

Atlanta, Georgia 30305

Tel.: (678) 553-2100

Fax: (678) 553-2386

CohenL@gtlaw.com

LockardV@gtlaw.com

HarkinsS@gtlaw.com

GREENBERG TRAURIG, LLP

Brian H. Rubenstein

1717 Arch Street, Suite 400

Philadelphia, Pennsylvania

Tel: (215) 988-7864

Fax: (214) 689-4419

rubensteinb@gtlaw.com

*Attorneys for Teva Pharmaceuticals
USA, Inc., Teva Pharmaceutical
Industries Ltd., Actavis Pharma, Inc.,
and Actavis LLC*

PIETRAGALLO GORDON ALFANO

BOSICK & RASPANTI, LLP

Clem C. Trischler

Jason M. Reefer

Frank H. Stoy

38th Floor, One Oxford Centre Pittsburgh,
Pennsylvania 15219

Tel.: (412) 263-2000

Fax: (412) 263-2001

cct@pietragallo.com

jmr@pietragallo.com

fhs@pietragallo.com

*Attorneys for Mylan Laboratories, Ltd.
and Mylan Pharmaceuticals, Inc.*

KIRKLAND & ELLIS LLP
Devora W. Allon
Alexia R. Brancato
601 Lexington Avenue
New York, New York 10022
Tel.: (212) 446-5967
Fax: (212) 446-6460
devora.allon@kirkland.com
alexia.brancato@kirkland.com

*Attorneys for Torrent Pharmaceuticals
Ltd.
and Torrent Pharma Inc.*

MORGAN, LEWIS & BOCKIUS LLP
John P. Lavelle, Jr.
1701 Market Street
Philadelphia, Pennsylvania 19103
Tel.: (215) 963-5000
Fax: (215) 963-5001
John.lavelle@morganlewis.com

John K. Gisleson
One Oxford Centre, Thirty-second Floor
Pittsburgh, Pennsylvania 15219
Tel.: (412) 560-3300
Fax: (412) 560-7001
John.gisleson@morganlewis.com

*Attorneys for Aurobindo Pharma Ltd.,
Aurobindo Pharma USA, Inc., and
Aurolife Pharma LLC*

LEWIS BRISBOIS BISGAARD & SMITH
LLP

Walter H. Swayze, III
Andrew F. Albero
550 E. Swedesford Road, Suite 270
Wayne, Pennsylvania 19087
Tel.: (215) 977-4100
Fax: (215) 977-4101
Pete.Swayze@lewisbrisbois.com
Andrew.Albero@lewisbrisbois.com

*Attorneys for Camber Pharmaceuticals,
Inc. and The Kroger Co.*

HILL WALLACK LLP
Eric I. Abraham
William P. Murtha
21 Roszel Road
P.O. Box 5226
Princeton, New Jersey 08543-5226
Tel.: (609) 734-6358
Fax: (609) 452-1888
eabraham@hillwallack.com
wmurtha@hillwallack.com

*Attorneys for Hetero Drugs, Ltd. and
Hetero Labs Ltd.*

HARDIN KUNDLA MCKEON &
POLETTTO
Janet L. Poletto, Esq.
Robert E. Blanton, Jr., Esq.
673 Morris Ave.
Springfield, New Jersey 07081
Tel.: (973) 912-5222
Fax: (973) 912-9212
jpoletto@hkmpp.com
rblanton@hkmpp.com

Attorneys for Hetero USA Inc.

BARNES & THORNBURG LLP

Sarah E. Johnston, *Liaison Counsel for
Retail Pharmacy Defendants*
Kristen L. Richer
2029 Century Park East
Suite 300
Los Angeles, California 90067
Tel.: (310) 284-3880
Fax: (310) 284-3894
sarah.johnston@btlaw.com
kristen.richer@btlaw.com

Kara Kapke
11 S Meridian St.
Indianapolis, Indiana 46204
Tel. (317) 236-1313
Fax (317) 231-7433
kara.kapke@btlaw.com

*Attorneys for CVS Pharmacy, Inc.
(incorrectly named as CVS Health
Corporation), Rite Aid Corporation,
Walgreen Co. (incorrectly named as
Walgreens Co.), and Walmart Inc.
(incorrectly named as Walmart Stores,
Inc.)*

HUSCH BLACKWELL LLP
Matt Knepper
James Spung
190 Carondelet Plaza
Suite 600
St. Louis, Missouri 63105
Tel.: (314) 480-1500
Fax: (314) 480-1505
Matt.knepper@huschblackwell.com
James.spung@huschblackwell.com

Attorneys for Express Scripts, Inc.

DORSEY & WHITNEY LLP

Shevon D.B. Rockett
Roxanna Gonzalez
51 West 52nd Street
New York, New York 10019
Tel.: (212) 415-9357
Fax: (212) 953-7201
rockett.shevon@dorsey.com
gonzalez.roxanna@dorsey.com

Attorneys for Optum, Inc. and Optum Rx

BUCHANAN INGERSOLL & ROONEY
PC

Jonathan D. Janow
Jason R. Parish
1700 K Street NW
Suite 300
Washington, DC 20006
Tel.: (202) 452-7940
Fax: (202) 452-7989
Jonathan.Janow@bipc.com
Jason.Parish@bipc.com

Attorneys for Albertson's LLC

CROWELL & MORING
Andrew D. Kaplan
Daniel T. Campbell
Marie S. Dennis
1001 Pennsylvania Avenue NW
Washington, D.C. 20004
Tel.: (202) 624-1000
Fax: (202) 628-5116
akaplan@crowell.com
dcampbell@crowell.com
mdennis@crowell.com

Attorneys for Cardinal Health, Inc.

ULMER & BERNE LLP

Jeffrey D. Geoppinger
312 Walnut Street, Suite 1400
Cincinnati, Ohio 45202-2409
Tel.: (513) 698-5038
Fax: (513) 698-5039
jgeoppinger@ulmer.com

*Attorney for AmerisourceBergen
Corporation*

NORTON ROSE FULBRIGHT US LLP
D'Lesli M. Davis
Ellie K. Norris
2200 Ross Avenue, Suite 3600
Dallas, Texas 75201-7932
Tel.: (214) 855-8221
Fax: (214) 855-8200
Dlesli.davis@nortonrosefulbright.com
Ellie.norris@nortonrosefulbright.com

Attorneys for McKesson Corporation

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2022, I electronically filed the foregoing Defendants' (Proposed) Surreply in Further Opposition to Plaintiffs' Motion for Class Certification of Third-Party Payor Claims with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

/s/ Jessica D. Miller
Jessica D. Miller (DC Bar No. 457021)